

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**



TRANSCRIPT OF RECORD.

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Court of Appeals, District of Columbia

~~STOBER~~

~~APRIL~~ TERM, 1903.

No. 1327.

224

No. ~~22~~ SPECIAL CALENDAR.

LOUIS C. KENGLA, WILLIAM F. KENGLA, CHARLES R.  
KENGLA, AND GUIDA A. KENGLA, APPELLANTS,

vs.

EPHRAIM S. RANDALL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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FILED MAY 29, 1903.



# COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

**OCTOBER**

**TERM, 1903.**

No. 1327.

**6**  
No. ~~1327~~, SPECIAL CALENDAR.

LOUIS C. KENGLA, WILLIAM F. KENGLA, CHARLES R.  
KENGLA, AND GUIDA A. KENGLA, APPELLANTS,

*vs.*

EPHRAIM S. RANDALL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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# In the Court of Appeals of the District of Columbia

LOUIS C. KENGLA ET AL., Appellants, }  
vs. } No. 1327.  
EPHRAIM S. RANDALL.

$\frac{1}{2}$  Court of Appeals of the District of Columbia, April Term,  
1903.

No. 150, Original Docket.

*In re* Estate of HENRY KENGLA, Deceased. No. 11245, Probate  
Court.

On consideration of the petition of Louis C. Kengla, William F. Kengla, Charles R. Kengla and Guida A. Kengla, for the allowance of a special appeal from an order of the supreme court of the District of Columbia, entered herein on the 20th day of April, A. D. 1903, it is now here ordered by the court, that said appeal be, and the same is hereby, allowed.

By the court:

R. H. ALVEY,  
*Chief Justice.*

May 6th, 1903.

A true copy.

Test:

[COURT SEAL.] ROBERT WILLETT, *Clerk.*

1 In the Supreme Court of the District of Columbia, Holding  
a Probate Court.

*In re* Estate of HENRY KENGLA, Deceased. No. 11245, Adm. Doc. 30.

*Petition of Ephraim S. Randall.*

Your petitioner says:—

1. That Henry Kengla died in the city of Washington in the District of Columbia on the 13th day of January, 1903. At the time of his death, and for many years prior thereto, said Henry Kengla had his domicile in the District of Columbia. He was a citizen of the United States.

2. Your petitioner is a citizen of the United States and a resident of the District of Columbia.

3. Said Henry Kengla at the time of his death owned a tract of

land comprising about one hundred and eighteen acres situated near Tennallytown, in the District of Columbia, and also five lots in that part of the city of Washington, commonly known as Georgetown, three of said lots being improved by substantial buildings. The value of all of said real estate is about one hundred and twenty-five thousand dollars (\$125,000.00). Said Henry Kengla at the time of his death owned sundry horses and wagons; farming implements; utensils and household furniture all of the value of about five hundred dollars. He had cash in bank about twenty-two thousand dollars (\$22,000.00). He also owned the stock and fixtures in

a shop in Georgetown on one of the improved parcels of real estate above referred to, which stock and fixtures were worth about one hundred dollars. He held also certain bills receivable of the value of about a thousand dollars.

4. The debts of said Henry Kengla at the time of his death so far as the petitioner has been able to learn did not exceed five hundred dollars (\$500.00) except that he owes about nineteen thousand dollars (\$19,000.00) which is secured by a deed of trust on the above mentioned tract of land comprising about one hundred and eighteen acres.

5. Said Henry Kengla was never married. He left no father, mother, brother or sister living. His next of kin and heirs at law, as the petitioner is informed and believes, are certain descendants of his deceased brother, Louis Kengla. The descendants of said Louis Kengla who survived said Henry Kengla are certain children and grand-children of said Louis Kengla, whose names and places of residence are as follows:

#### Children.

Louis Christopher Kengla, 3042 N St., N. W., Washington, D. C.; William Frederick Kengla, Sligo, Maryland; Joseph Theodosia Kengla, 2520 Wisconsin avenue, Washington, D. C.; Margaret Lydane, 3325 O St., N. W., Washington, D. C.; Charles Robert Kengla, 3240 Wisconsin avenue, N. W., Washington, D. C.; Edward Lorenzo Kengla, 927 Rhode Island avenue, N. W., Washington, D. C.

#### Grand-children.

##### Children of Jacob Henry Kengla, deceased.

Louis Kengla, San Francisco, California; William Kengla, residence unknown; Blanche Dilli, residence unknown; Guida Kengla, residence unknown; Leo Kengla, New York city, street and number unknown.

##### Child of Catherine Ann Green, deceased.

Henry Webster Green, 947 Park avenue, New York city.



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## Children of Thresa Cecelia Lyddane.

Margaret Lyddane, 3313 N street, N. W., Washington, D. C.; James Edmund Lyddane, 3313 O street, N. W., Washington, D. C.; Catherine Lyddane, 3313 O street, N. W., Washington, D. C.; Eugene Thomas Lyddane, Junior, 3313 O street, N. W., Washington, D. C.; Aloysius Roccoffort Lyddane, 403 Chapel street, New Haven Connecticut; Leo Lyddane, 3313 O street, N. W., Washington, D. C.

## Children of George — Mary Kengla, deceased.

Edith Brown, Ridge road, Washington, D. C.; Eunice Kengla, Frederick, Maryland.

6. On information and belief the petitioner avers that all the above named persons are of age except Leo Lyddane, who is a minor of the age of about seventeen years.

7. On or about the 27th day of November, 1895, said Henry Kengla executed in due form of law as a will both of real and personal estate a paper bearing that date purporting to be his last will and which is filed herewith. On information and belief the petitioner avers that said instrument is in fact the last will and testament of said deceased. In and by said instrument said Henry Kengla appointed your petitioner and George C. Payne executors thereof. Said George C. Payne was living at the time of the execution of said will by said Henry Kengla, but he died before said Henry Kengla.

Your petitioner therefore prays:

1st. That a citation may issue to the parties in interest hereinbefore named requiring them to appear at some day certain to be named therein to answer this petition and abide by and perform such order and judgment as may be made herein, and that a guardian *ad litem* be appointed for the infant defendant.

4 2nd. That said instrument, dated the 27th day of November, 1895, may be admitted to probate and record in this court as the last will and testament of said Henry Kengla, and that letters testamentary may be issued to this petitioner accordingly.

3rd. For such other and further relief as to the court may seem meet.

EPHRAIM S. RANDALL.

A. S. WORTHINGTON,  
JOSEPH D. WRIGHT,  
*Attorneys for Petitioner.*

I, Ephraim S. Randall, on oath say that I have read the foregoing petition by me subscribed and know the contents thereof; that the facts therein stated of my own knowledge are true; and that those stated upon information and belief, I believe to be true.

EPHRAIM S. RANDALL.

Subscribed and sworn to before me, a notary public in and for the District of Columbia, this 17th day of January, A. D. 1903.

[NOTARIAL SEAL.]

LAWRENCE HUFTY,  
*Notary Public, D. C.*

(Endorsement: Petition of Ephraim S. Randall for probate of will and letters testamentary. Filed Jan. 17, 1903. Louis A. Dent, register of wills, D. C., clerk of probate court.)

5 In the Supreme Court of the District of Columbia, Holding a Probate Court.

*In re* Estate HENRY KENGLA, Deceased. No. 11245.

Now come Louis C. Kengla, William F. Kengla, Charles R. Kengla, and Guida A. Kengla, and for answer to the petition of Ephraim S. Randall, filed herein propounding for probate a paper writing purporting to bear date the 27th day of November, A. D., 1895, as the last will and testament of the said Henry Kengla, say:

1st. That they admit that the said Henry Kengla executed the said paper writing in due form of law to pass title to both real and personal property.

2nd. But they deny that the said paper writing is the last will and testament of the said Henry Kengla, because they say:

a. That at the time of the execution of said paper writing by the said Henry Kengla he was not of sound and disposing mind, understanding or memory, and not competent to execute a valid deed or contract.

b. That the said Henry Kengla was induced to execute the said paper writing by fraud, undue influence and importunities practiced and exercised upon him by the said Ephraim S. Randall and one

6 Elizabeth Homiller and others when his mind was in such weak and enfeebled condition that he was unable to withstand their importunities, and that said paper writing is not the will of the said Henry Kengla, and is absolutely void and of no effect in law, and should be refused probate by this honorable court.

L. C. KENGLA.  
WM. F. KENGLA.  
CHARLES R. KENGLA.  
GUIDA A. KENGLA.

DISTRICT OF COLUMBIA, *To wit*:

Louis C. Kengla, William F. Kengla, Charles R. Kengla, and Guida A. Kengla, being first duly sworn, depose and say that they are the respondents named in the foregoing answer by them subscribed; that they have read said answer and know the contents thereof, and that the statements therein made of their own knowl-

edge are true, and those made upon information and belief, they believe to be true.

L. C. KENGLA.  
WM. F. KENGLA.  
CHARLES R. KENGLA.  
GUIDA A. KENGLA.

Subscribed and sworn to before me this 3rd day of February, A. D. 1903.

WALTER F. DONALDSON,  
*Notary Public, D. C.*

[NOTARIAL SEAL.]

CHAS. C. COLE,  
R. GOLDEN DONALDSON,  
HAMILTON AND COLBERT, AND  
GORDON AND GORDON,  
*Att'ys for Caveators.*

(Endorsement: Answer of Louis C. Kengla, William F. Kengla, Guida A. Kengla and Charles R. Kengla to petition of Ephriam S. Randall. Filed Feb. 4, 1903. Louis A. Dent, register of wills, D. C., clerk of probate court.)

7 In the Supreme Court of the District of Columbia, Holding a Probate Court.

*In re* Estate of HENRY KENGLA, Deceased. No. 11245.

Upon consideration of the petition of Ephriam S. Randall filed in this cause for the probate of a paper writing as the last will and testament of said decedent, and the answer and caveat thereto by Louis C. Kengla, William F. Kengla, Charles R. Kengla and Guida A. Kengla, and the matter having been presented to the court, and counsel for all the parties in interest having been heard, it is this 5th day of February, 1903, ordered that letters of collection in the above entitled estate be issued unto R. Golden Donaldson and Joseph D. Wright upon their giving bond in the sum of thirty-five thousand dollars.

JOB BARNARD, *Justice.*

\_\_\_\_\_,  
\_\_\_\_\_,

*Att'ys for Caveators.*

(Endorsement: Order appointing R. Golden Donaldson and Joseph D. Wright collectors. Bond \$35000. Filed Feb. 5th, 1903. Louis A. Dent, register of wills, D. C., clerk of probate court.)

8        In the Supreme Court of the District of Columbia, Holding a  
             Probate Court.

*In re* Estate of HENRY KENGLA, Deceased. No. 11245.

To the supreme court of the District of Columbia, holding a probate court :

The petition of Ephraim S. Randall respectfully shows to the court :

1. That on, to wit: the 17th day of January, 1903, he, as the surviving executor thereof filed with the register of wills of the District of Columbia, as will appear by reference to the record herein, the last will and testament of the said Kengla, deceased, and prayed for the admission of the said will to probate and record, and the granting to your petitioner of letters testamentary; that on to wit: the 4th day of February, 1903, a caveat was filed herein objecting to the admission of the said will to probate and the granting of letters testamentary to your petitioner, as prayed in his said petition, and alleging among other things that the said testator was, at the time of making and executing said will, of unsound mind and not mentally capable of executing a valid will; that the said will was obtained by undue influence, duress and fraud practiced upon the said testator at the time of execution of the said will.

2. That in order for your petitioner to properly defend the said will and the issues to be tried in respect to the same, and to  
9        carry out the wishes of the said testator in having his will duly admitted to probate and record, it is necessary for your petitioner to employ counsel to appear and defend the said will and the issues raised by the filing of the said caveat herein.

3. That on to wit: the 6th day of February, 1903, R. Golden Donaldson and Joseph D. Wright were appointed by this honorable court collectors of the estate of the said Henry Kengla, deceased, to collect and hold the personal estate of the said deceased pending the determination of the issues herein; that your petitioner has turned over to the said collectors, and they now have under their control, all the funds of the said estate which came into his hands as executor as aforesaid.

Wherefore your petitioner prays :

1. That he may be authorized by this honorable court to employ such counsel as may be necessary to represent him in properly defending the said will and determining the issues herein, and that the said collectors be authorized and directed to pay said counsel a reasonable retainer and counsel fee for their services herein, and that the said collectors may be further authorized and directed to pay such other and further expenses as may be proper and necessary in collecting the evidence and defraying costs of the trial.

2. And for such other and further relief as to the court may seem proper in the premises.

EPHRAIM S. RANDALL,  
*Executor of the Estate of Henry Kengla, Deceased, Petitioner.*

A. S. WORTHINGTON,  
JOSEPH D. WRIGHT,  
*Att'ys for Petitioner.*

10 DISTRICT OF COLUMBIA, }  
City of Washington, } ss.:

I, Ephraim S. Randall, on oath say that I have read the foregoing petition by me subscribed and know the contents thereof, that the things therein stated on my personal knowledge are true and those on information and belief I believe to be true.

EPHRAIM S. RANDALL.

Subscribed and sworn to before me this 18th day of March, 1903.

[NOTARIAL SEAL.] JOHN A. SWEENEY,  
*Notary Public, D. C.*

11 Messrs. Cole & Donaldson, Hamilton & Colbert, and Gordon & Gordon, attorneys for caveators.

GENTLEMEN: Please take notice that above application hereto attached will be called to the attention of the justice holding the probate court at ten o'clock on Friday morning March 20th 1903, or as soon thereafter as counsel can be heard.

A. S. WORTHINGTON,  
JOSEPH D. WRIGHT,  
*Attorneys for Petitioner.*

Service of the above application and notice is hereby accepted this 18th day of March, 1903.

GORDON & GORDON,  
*For Parties to Caveat.*

C. C. COLE AND  
R. GOLDEN DONALDSON.  
HAMILTON & COLBERT.

(Endorsement: Petition for leave to employ counsel and to pay retainer & counsel fees, and other costs & expenses. Filed Mar. 19, 1903. Louis A. Dent, register of Wills, D. C., clerk of probate court.)

12 In the Supreme Court of the District of Columbia, Holding a Probate Court.

*In re* Estate HENRY KENGLA, Deceased. No. 11245.

The answer of Charles R. Kengla and Louis C. Kengla to the petition of Ephraim S. Randall, filed herein, praying for leave to employ counsel and pay counsel fees out of the money in the hands of the collectors.

For answer to said petition these respondents say :

1st. That they admit that on the 17th day of January, 1903, a paper writing was filed in the office of the register of wills of this District, and that thereafter the petitioner filed his answer praying for the admission of the said paper writing for probate as the last will and testament of the said Henry Kengla, deceased.

They also admit that on the — day of February, 1903, a caveat was filed herein objecting to the admission of the said paper writing to probate and record as the last will of said deceased, and that said caveat contained, among other things, an allegation to the effect that the said deceased at the time of the making of said paper writing was of unsound mind and incapable of executing a valid will, and that the execution of said paper writing was obtained by undue influence, duress and fraud practiced upon the said deceased at the time of the execution thereof.

2nd. Your respondents also admit that R. Golden Donaldson and Joseph D. Wright have been appointed collectors of said  
13 estate, and that pursuant to their appointment they have qualified and have collected certain moneys belonging to said estate and now have the same to their credit in the Riggs national bank of this city.

Responding to the allegation in said petition that the said Ephraim S. Randall has turned over to the said collectors, and they now have under their control, all the funds of the said estate which came into his possession as executor as aforesaid, these respondents, for lack of information upon the subject can neither admit nor deny the truth thereof, but if the same be material they require strict proof thereof; but they have reason to believe that the said Ephraim S. Randall is himself a debtor to the estate in a large sum of money.

3rd. Further answer- said petition these respondents say that the undue influence, duress and fraud practiced upon the said deceased at the time of the execution of said paper writing, as respondents believe and charge, was so practiced upon the said deceased by the said Ephraim S. Randall, and also by some of the beneficiaries under said paper writing, and that said paper writing is not the will of the said deceased, but represents the wishes of said Ephraim S. Randall and of certain of the beneficiaries named in said paper writing.

4th. Further responding to said petition these respondents say

that they earnestly protest against the passage of any order at this stage of the proceeding authorizing the executor to employ counsel to defend the will, or use any of the moneys of this estate for the purpose of sustaining or maintaining the said paper writing, or any expenses connected therewith, in view of the allegations in the caveat and this answer.

CHARLES R. KENGLA.  
LEWIS C. KENGLA.

\_\_\_\_\_,  
\_\_\_\_\_,

*Solicitors for Respondents.*

14 DISTRICT OF COLUMBIA, *To wit:*

Charles R. Kengla and Louis C. Kengla, being first duly sworn, depose and say that they are the respondents named in the foregoing answer by them subscribed; that they have read the same and know the contents thereof and that the statements therein made of their own knowledge are true, and those therein made upon information and belief, they believe to be true.

[NOTARIAL SEAL.]

CHARLES R. KENGLA.  
LEWIS C. KENGLA.

Subscribed and sworn to before me this 3rd day of April, A. D. 1903.

WALTER F. DONALDSON,  
*Notary Public, D. C.*

(Endorsement: Answer of Charles R. Kengla and Louis C. Kengla to petition of Ephraim S. Randall. Filed Mar. 26, 1903. Louis A. Dent, register of wills, D. C., clerk of probate court.)

15 In the Supreme Court of the District of Columbia, Holding a Probate Court.

*In re* Estate of HENRY KENGLA, Deceased. No. 11245.

Upon consideration of the petition of Ephraim S. Randall, executor of the last will and testament of Henry Kengla, deceased, filed herein on the 19th day of March, 1903, and after hearing counsel for the caveators in opposition thereto, it is by the court this 20th day of April, 1903, ordered that the said Ephraim S. Randall, as such executor, be and he hereby is authorized and empowered to retain and employ A. S. Worthington and Joseph D. Wright, attorneys, to represent said executor in this proceeding; and it is further ordered that the collectors herein be and they hereby are authorized and directed to pay said counsel a retaining fee of five hundred dollars (\$500.00) each.

JOB BARNARD, *Justice.*

(Endorsement: Order authorizing executor to employ counsel, and directing collectors to pay said counsel a retaining fee of \$500. Filed Apr. 20, 1903. Louis A. Dent, register of wills, D. C., clerk of probate court.)

16 In the Supreme Court of the District of Columbia, Holding a Probate Court.

*In re* Estate of HENRY KENGLA, Deceased. No. 11245.

The register of wills will please make up a record for the Court of Appeals in this matter, as follows:

- 1st. Petition of Ephraim S. Randall for the probate of the will.
- 2nd. The caveat of Charles R. Kengla and others.
- 3rd. Order of the court appointing collectors.
- 4th. Petition of Ephraim S. Randall for leave to employ counsel and pay fee.
- 5th. Answer of Charles R. Kengla and others to said petition.
- 6th. Order of the court of April 20th, 1903, directing collectors to pay fee.
- 7th. Order of Court of Appeals allowing special appeal.

C. C. COLE,  
R. GOLDEN DONALDSON,  
HAMILTON & COLBERT,  
GORDON & GORDON,  
*Att'ys for Caveators.*

I consent to the above.

JOSEPH D. WRIGHT,  
*Attorney for Executor.*

(Endorsement: Request (order) of Messrs. Cole & Donaldson to make transcript of record on appeal. Filed May 8, 1903. Louis A. Dent, register of wills, D. C., clerk of probate court.)

Supreme Court of the District of Columbia, Holding a Probate Court.

DISTRICT OF COLUMBIA, *To wit*:

I, John R. Rouzer, deputy register of wills for the District of Columbia, clerk of the probate court, do hereby certify the foregoing pages, numbered from  $\frac{1}{2}$  to 16, inclusive, to be true copies of the originals of certain papers on file in the office of the register of wills, clerk of the probate court, in case No. 11245, estate of Henry Kengla, deceased, wherein Guida A. Kengla *et al.* are appellants, and Ephraim S. Randall is appellee, the same constituting a full, true, and correct transcript of record of proceedings had in said cause according to the stipulation of counsel filed therein and made a part hereof.

I further certify, that the bond for appeal, in the penalty of one



hundred dollars, was duly filed by said appellants, and approved by said court on the 13th day of May, A. D. 1903.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said probate court, this 20th day of May, A. D. 1903.

[Seal Supreme Court of the District of Columbia, Probate Jurisdiction.]

JOHN R. ROUZER,  
*Deputy Register of Wills for the District of Columbia,*  
*Clerk of the Probate Court.*

Endorsed on cover: District of Columbia supreme court. No. 1327. Louis C. Kengla *et al.*, appellants, *vs.* Ephraim S. Randall. Court of Appeals, District of Columbia. Filed May 29, 1903. Robert Willett, clerk.

*Robert D. Wells*  
CLERK  
**Court of Appeals, District of Columbia.**

**OCTOBER TERM, 1903.**

*No. 1327.*

**NO 6 SPECIAL CALENDAR,**

**LOUIS C. KENGLA ET AL., APPELLANTS,**

**vs.**

**EPHRAIM S. RANDALL, APPELLEE.**

**BRIEF FOR APPELLEE.**

**A. S. WORTHINGTON,**

**JOSEPH D. WRIGHT,**

*Attorneys for Appellee.*



# Court of Appeals, District of Columbia.

OCTOBER TERM, 1903.

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No. 1327.

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NO 6 SPECIAL CALENDAR,  
LOUIS C. KENGLA ET AL., APPELLANTS,

vs.

EPHRAIM S. RANDALL, APPELLEE.

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## STATEMENT OF FACTS.

This is an appeal specially allowed from an order of the Supreme Court of the District of Columbia, sitting as a probate court, authorizing the appellee, as the executor of the last will and testament of Henry Kengla, deceased, to employ counsel to defend the said will against the *caveat* filed by the appellants, and directing the collectors of the estate of the said Kengla to pay said counsel a retaining fee (Rec., 9).

Henry Kengla, appellee's testator, died in the District of Columbia on the 13th day of January, 1903. At the time of his death he owned a tract of land comprising about one hundred and eighteen acres, near Tennallytown, in the District of Columbia, and also five lots in Georgetown, all of said real estate being of the value of about \$125,000. In addition to the real estate he owned certain personal property of the value of about \$500, besides having about \$22,000 cash in bank. With the exception of about

\$19,000, secured by a deed of trust on the above tract of land, the debts of the said deceased do not exceed five hundred dollars (Rec., 2).

He left a last will and testament, executed on or about the 27th day of November, 1895, wherein he named the appellee and one George C. Payne executors; the said Payne predeceased the said testator, and on the 17th day of January, 1903, the appellee, as the surviving executor, filed his petition, with the said will, in the probate court, praying that the said will might be admitted to probate and record and letters testamentary granted to the said petitioner (Rec., 1-3).

Thereafterwards, on the 3d day of February, 1903, the appellants filed a caveat objecting to the probating of the said will as the last will and testament of the said Henry Kengla, deceased, alleging that, at the time of the execution thereof, the said Kengla was not of sound and disposing mind, and that he was induced to execute the same by fraud and undue influence practiced upon him (Rec., 4).

Whereupon the court, on February 5, 1903, appointed collectors to take charge of the estate of the said deceased pending the determination of the issues involved in this cause (Rec., 5).

Thereupon, on the 19th day of March, 1903, the appellee filed in the court below his application for leave to employ counsel to represent him as executor in properly defending the said will, and further praying that the said collectors be directed to pay such counsel a reasonable retaining fee (Rec., 6). The appellants then, on March 26, 1903, filed their answer to the said petition objecting to granting the prayers of the same (Rec., 8). The said cause then coming on for hearing on the petition and answer thereto, the court, on the 20th day of April, 1903, authorized the appellee, as executor, to employ A. S. Worthington and Joseph D. Wright, attorneys, to represent him in said cause, and directed the said collectors

to pay out of the said estate each of said counsel a retaining fee of \$500 (Rec., 9).

It is from this order that the appellants have prosecuted this appeal.

### ARGUMENT.

The question presented for the determination of this court is: Has the court the authority to authorize the executor to employ counsel, and to allow a retaining fee to said counsel employed by him in defending the will, after the filing of the petition for probate, and the caveat thereto, before the admission of the will to probate and the granting of letters testamentary?

This question was before this court in the case of *Tuohy vs. Hanlon*, 18 App. D. C., 225, and was, in an exhaustive opinion, answered in the affirmative. In that case the executor, after a *caveat* was filed against admitting the will to probate, made an unsuccessful attempt to maintain the said will and asked the court for an allowance of \$500 paid counsel in the attempt to establish the will, which the court granted, and on appeal this court sustained the allowance and said:

“We think that the court below in this case acted within the authority conferred upon it by law; and that, as it so acted, the amount of the allowance was discretionary with it.”

In the case of *In re Pritchard*, 30 W. L. R., 9, in a well-considered opinion, Mr. Justice Barnard sustained the allowance of a retaining fee, and said that—

“The recent case of *Tuohy, Administrator, vs. Hanlon*, decided by the Court of Appeals of this District in May last, seems to be conclusive as to the authority of this court in a case like this.”

In the Pritchard case, *supra*, the executor filed a petition for probate of the will. A caveat was filed, and letters of collection were issued. Application was then made for leave to employ counsel and to pay them out of the moneys of the estate a proper retainer fee. This application was granted, and on the final hearing the court held :

“By principle and authority, as well as by requirements of public policy in administering the law of wills, and of decedents’ estates, I am led to conclude that the order heretofore granted to authorize the employment of counsel was proper, although I think notice should have been first given ; and that the allowance now asked for attorneys’ fees and expenses of the trial should be made.”

It has been the law of the State of Maryland, from which the probate law of this District is derived, to make allowances for counsel of the executor in such cases.

Compton *vs.* Barnes, 4 Gill, 55.

Glass *vs.* Ramsey, 9 Gill, 456.

In Compton *vs.* Barnes, 4 Gill, 55, the grandson of the deceased filed a caveat to vacate the will. The executor appeared to the caveat and applied to the orphans’ court to make an allowance for the employment of counsel to resist the caveat. The court passed an order making an allowance to the counsel *to be employed in opposing the caveat and directed the payment thereof out of the estate of the testator.* The court said :

“After the probate of the will, and the granting of letters testamentary to the executors, it was their bounden duty to appear to the caveat, and in the defense to make all necessary preparations for its trial, upon its merits. The employment of counsel for that purpose, follows as a necessary incident to the unquestioned powers and duties of the executors ; and it would be inconsistent with every principle of reason, law and justice, not to allow to the executors out of the estate of the deceased, the expenses by them necessarily incurred in

the faithful discharge of their duties. \* \* \* The order of the orphans' court, appealed from, is affirmed with costs."

To the same effect are the decisions in other jurisdictions.

*Munden vs. Bailey*, 70 Ala., 63.

*Lassiter vs. Travis*, 98 Tenn., 330.

*Phillips vs. Phillips*, 81 Ky., 328.

*Day vs. Day*, 3 N. J. Eq., 549.

*Chisholm vs. Barnard*, 10 Grant's Ch. (U. C.), 479.

In *Munden vs. Bailey*, 70 Ala., 63, the court said:

"An administrator may employ counsel, when necessary to protect and preserve the interests of the estate, or to enable him to pursue the proper line of conduct in the discharge of the delicate duties with which he is sometimes intrusted; and he may, as a rule, pay a reasonable retainer to counsel to advise and aid him in the trust."

In *Chisholm vs. Barnard*, 10 Grant's Ch. (U. C.), 479, the chancellor said:

"I think, as I stated at the time, that the charge for the retaining fee paid to the solicitors for the executors should be allowed; it was not an unreasonable disbursement for them to make."

(The facts of this case are not given in the report.)

Subchapter VII of chapter V of the Code, in regard to the accounts of executors and administrators in section 365, under head of "Disbursements and allowances," provides that in the accounts of executors and administrators "shall be stated the disbursements by him made, namely: \* \* \* Fifth. His allowance for costs, attorneys' fees, and extraordinary expenses which the court may think proper to allow."

This section seems to leave the question to the discretion of the court, and there is nothing in the chapter referred to



which limits the exercise of this discretion to the final accounting.

When the caveat was filed it became the duty of the executor to defend the will, otherwise he would be unworthy the trust reposed in him by his testator.

*Tuohy vs. Hanlon*, 18, App. D. C., 225.

*In re Pritchard*, 30 W. L. R., 9.

*Compton vs. Barnes*, 4 Gill, 55.

*Meeker vs. Meeker*, 74 Iowa, 352.

Attention is called to the fact that the amount of the allowance to counsel is admitted to be reasonable, and that question is not, therefore, before the court for consideration.

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